

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ISRAEL MARCOLINO SCHAFFNER,

Plaintiff,

- against -

DIAMOND RESORTS HOLDINGS, LLC,
et al.,

Defendants.

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LEVY, United States Magistrate Judge:

REPORT AND
RECOMMENDATION

19 CV 5298 (AMD)(RML)

By order dated August 16, 2021, the Honorable Ann M. Donnelly, United States District Judge, referred plaintiff's motion for a default judgment to me for report and recommendation. (See Motion for Default Judgment, dated July 19, 2021 ("Default Mot."), Dkt. No. 31; Order of Referral, dated Aug. 16, 2021.) For the reasons stated below, I respectfully recommend that the motion be denied.

Plaintiff Israel Marcolino Schaffner ("plaintiff") commenced this case in July 2019 in New York Supreme Court, Queens County. It was removed to this court on September 17, 2019. By Memorandum and Order dated June 24, 2020, Judge Donnelly granted summary judgment in favor of defendants Diamond Resorts Holdings, LLC, Diamond Resorts International, Inc., Diamond Resorts International Marketing, Inc., Diamond Resorts International Club, Inc., Diamond Resorts Management, Inc., Diamond Resorts Developer & Sales Holdings Company; Diamond Resorts Financial Services, Inc., Diamond Resorts U.S. Collection, L.L.C., Diamond Resorts U.S. Collection Members Association, Michael Flaskey and Kenneth Siegel (the "Diamond defendants"). (See Memorandum and Order, dated June 24,

2020, Dkt. No. 30.)¹ Accordingly, to the extent plaintiff seeks a default judgment against those defendants, it must be denied.

In the Memorandum and Order, the court gave plaintiff leave to move for a default judgment “against the remaining defendant within 30 days.” (Id. at 9.) That is a reference to defendant Vitor Menna Barreto, who has never appeared in this action. (Id. at 1 n.2.) However, I have scoured the docket, and I can find no proof of service of a summons and complaint on defendant Barreto. In his motion for default judgment, plaintiff makes no mention of service of process. (See Default Mot.) In the absence of an affidavit of service with respect to the last remaining defendant in the case, I respectfully recommend that plaintiff’s motion be denied and that this case be closed.

Any objections to this Report and Recommendation must be filed electronically or with the Clerk of the Court within fourteen (14) days. Failure to file objections within the specified time waives the right to appeal the district court’s order. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72, 6(a), 6(e).

Respectfully submitted,

/s/
ROBERT M. LEVY
United States Magistrate Judge

Dated: Brooklyn, New York
October 19, 2021

¹ On June 1, 2020, Judge Donnelly granted the Diamond defendants’ motion to dismiss plaintiff’s federal claims and allowed the case to proceed with respect to the supplemental state law claims for intentional infliction of emotional distress and for violations of Section 349 of New York’s General Business Law. (Memorandum and Order, dated June 1, 2020.) On July 13, 2020, Judge Donnelly denied the Diamond defendants’ motion for reconsideration and gave plaintiff until August 27, 2020 to amend his complaint. Plaintiff did not file or serve an amended complaint, and the court granted summary judgment on the remaining state law claims.